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NORTH MALAYA ENGINEERS TRADING CO SDN BHD

v.

AIK AIK HOLDINGS SDN BHD

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HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[COMPANIES (WINDING-UP) PETITION NO: 28-20-1995]
24 JANUARY 2014

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COMPANY LAW: *Liquidation - Leave to commence action against company - Test to be applied - Applicants claiming beneficial interest in property developed by company in liquidation - Whether applicants failed to act expeditiously to protect their alleged interest - Whether liquidator had properly obtained vesting order - Property concerned sold to bona fide third party purchaser - Whether court reluctant to interfere with exercise of liquidator's duties - Whether leave to commence action refused - Companies Act 1965, s. 226(3)*

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COMPANY LAW: *Winding up - Proceedings against company - Leave to commence action against company - Test to be applied - Applicants claiming beneficial interest in property developed by company in liquidation - Whether applicants failed to act expeditiously to protect their alleged interest - Where liquidator had properly obtained vesting order - Property concerned sold to bona fide third party purchaser - Whether court reluctant to interfere with exercise of liquidator's duties - Whether leave to commence action refused - Companies Act 1965, s. 226(3)*

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The respondent was a developer of a shop office complex called Kompleks Aik Aik in Teluk Intan. It ran into financial difficulties and the units were not completed on time. The petitioner wound up the respondent on 26 September 1996 and the official receiver ('OR') was appointed as the provisional liquidator. Subsequently, the current liquidator ('the liquidator') was appointed liquidator on 4 February 2008 to replace the OR. As there was a lapse of some 12 years from the date of winding up of the company, the liquidator had difficulties in locating all documents with respect to the assets of the company. The liquidator undertook an ownership verification exercise to ascertain the ownership of the various units in Kompleks Aik Aik. Advertisements were placed in the local newspapers on three different dates. The documents which the purchasers were required to furnish to the liquidator were set out. Letters were also sent out by the liquidator to the purchasers to inform them of a meeting to be held to explain the verification

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exercise to the unit owners. A deadline was set for all the complete documents to be furnished to the liquidator. The proposed interveners ('the applicants') claimed ownership of several of the units in Kompleks Aik Aik. The applicants had responded to the liquidator's notice of verification exercise. However, their documents were not complete and after the expiry of the deadline set by the liquidator, the liquidator proceeded to obtain a vesting order vesting the units that could not be verified in the name of the liquidator of the company. The liquidator then proceeded to advertise for a public tender of these units and they were sold to a successful bidder, Jurimba Sdn Bhd. After realising that their units have been sold, the applicants applied to intervene in the proceedings to obtain leave under s. 226(3) of the Companies Act 1965 ('s. 226(3)') to commence proceedings against the company and/or its liquidator on the ground that the company through its liquidator had wrongfully disposed of their units to a third party.

Held (dismissing application):

(1) As for the test to be applied, the applicant had to show some *prima facie* evidence of succeeding at the trial so that the limited resources of a liquidator, who is an officer of the court, are not unnecessarily dissipated when it could be better focused on an expeditious and effective administration of the assets of the company in liquidation for the benefit of all stakeholders. The purpose of leave is to sieve out frivolous and unmeritorious claims and on the facts, the applicants were alleging fraud on the part of the liquidator. The allegations at the leave stage must be scrutinised more strictly. (para 15)

(2) More than ample time had been given to the applicants with respect to the intention of the liquidator to apply to the court for a vesting order. The liquidator had carried out their duties within the ambit of the law by taking all precautionary steps and measures to identify sold and unsold units in Kompleks Aik Aik. The vesting order was obtained after a full and frank disclosure as to what had taken place in the verification exercise taken. The applicants had failed to protect their alleged beneficial interest by responding to the verification exercise conducted by the liquidator. (paras 26 & 28)

(3) The said units had been sold to a purchaser who had purchased them through a tender exercise. There was no indication that the third party purchaser was anything less than a *bona fide* purchaser. It was thus too late to unscramble the whole exercise. (paras 33 & 34)

(4) The court would be most reluctant to interfere with the exercise of the duties of the liquidator confronted with many units having incomplete documentations because of the long lapse of some 12 years from the date the company was wound up to the appointment of the liquidator (*Chin Ah Keow v. Anggun Pintas Sdn Bhd & Ors*; refd). (para 36)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

Chatib Kari v. Mosbert Bhd [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 HC ***(refd)***

Chin Ah Keow v. Anggun Pintas Sdn Bhd & Ors [2005] 1 LNS 92 HC ***(refd)***

Erlanger v. New Sombrero Phosphate [1878] 3 App 1218 ***(refd)***

Excalibur Group Pte Ltd v. Goh Boon Kon [2012] 2 SLR 999 ***(refd)***

Hee Kon Ying v. Janlee Development (M) Sdn Bhd & Another Appeal [2012] 1 LNS 790 HC ***(refd)***

Kewangan Bersatu Bhd v. Yap Ah Yit & Ors [1999] 1 CLJ 429 HC ***(refd)***

Mosbert Bhd (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***

Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***

Re London Iron and Steel Co Ltd [1990] BCLC 372 ***(refd)***

Re Perdana Merchant Bankers Bhd [1997] 1 LNS 408 HC ***(refd)***

Resolution Alliance Sdn Bhd v. Jerah Bina Sdn Bhd (In Liquidation) & 3 Ors (Originating Summons No 24NCC-85-03-2012) (Unreported) ***(refd)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [2009] 1 LNS 1030 HC ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***

The "Honey I" Ex "Cassio" Singapore Slipway & Engineering Co (Pte) Ltd v. The "Honey I" Ex "Cassio" (Owners) Robina Credit Ltd & Ors (Interveners) [1987] 1 LNS 42 HC ***(refd)***

Wong Yuen Hock v. Ban Hin Lee Bank Bhd & Anor [2002] 4 CLJ 99 CA ***(refd)***

Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 226(3), 233, 279

For the interveners/applicants - Pavendeep Singh; M/s Bachan & Kartar
For the respondent - Sabrina Richards; M/s Hakem Arabi & Assocs

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

[1] The respondent company ('the company') was a developer. It developed a shop office complex called Kompleks Aik Aik in Teluk Intan. However it ran into financial difficulties and the units were not completed on time. Finally a creditor in the petitioner wound up the respondent on 26 September 1996. The official receiver ('OR') was appointed as the provisional liquidator. Nothing was moving very much in terms of the vesting of the assets of the company in the OR. The current liquidator Jambulingam Sethuraman Raki ('the liquidator') was appointed liquidator on 4 February 2008 to replace the OR.

[2] As there was a lapse of some 12 years from the date of winding up of the company, the liquidator had difficulties in locating all documents with respect to the assets of the company, the record of sale and purchase transactions entered into between the company and the purchasers, audited records and accounts and other documents incidental to the management of the company.

[3] The liquidator undertook an ownership verification exercise to ascertain the ownership of the various units in Kompleks Aik Aik. Advertisements were placed in the local newspapers on three different dates. The documents the purchasers were required to furnish to the liquidator were also set out. Letters were also sent out by the liquidator to the purchasers to inform them of a meeting to be held to explain the verification exercise to the unit owners. A deadline was also set for all the complete documents to be furnished to the liquidator.

Problem

[4] The proposed interveners/applicants are Wong Hoe Lim and Ngoo Heing Hwa, Lim Tiang Choy, Wong Ngan Sim and Wong Kong. The Units that they are claiming ownership are A2/8B, A2/2B, A1/15 and A2/10A respectively ("the Units") held under Master Title Geran No. 9332, Lot No. 1146 and PN 12617, Lot No. 68, both of Bandar Teluk Intan, Daerah Hilir Perak, Negeri Perak Darul Ridzuan.

[5] The proposed interveners/applicants in the current application in encl. 44 responded to the liquidator's notice of verification exercise. However the documents were not complete

and after the expiry of the deadline set by the liquidator, the liquidator proceeded to obtain from the High Court a vesting order vesting the units that could not be verified in the name of the liquidator of the company. The liquidator then proceeded to advertise for a public tender of these units and these were sold to a successful bidder, Jurimba Sdn Bhd.

[6] After realising that their units have been sold, these proposed interveners/applicants applied to intervene in the proceedings to obtain leave under s. 226(3) of the Companies Act 1965 to commence proceedings against the company and/or its liquidator on ground that the company through its liquidator had wrongfully disposed of their units to a third party.

Prayer

[7] The applicants were seeking leave of the court to continue with the intended suit for, *inter alia*, the following:

(i) A declaration that the applicants are the lawful purchasers and owners of the shop lots which were built on the land under CT No 1022 Lot 68 Bandar Teluk Anson and Grant No 9332 Lot 1146 pursuant to the sale and purchase agreement dated 31 October 1987;

(ii) A declaration that the sales and purchase agreement dated 13 December 2010 entered between the respondent, Fenghua Development Sdn Bhd and Jurimba Sdn Bhd is null and void and of no legal effect;

(iii) An injunction order to the effect that Jurimba Sdn Bhd either by itself and/or through the agents or representatives of the respondent be injuncted from interfering in any way with the applicants' ownership and entitlement to the said shop lots;

(iv) The order of the High Court dated 4 May 2010 pertaining to the applicants' shop lots be set aside and/or varied and that the applicants' shop lots be removed from the said vesting order;

(v) An order that damages be paid to the applicants by the respondent and Fenghua Development Sdn Bhd for breach of contract as well as damages for fraud perpetuated the respondent, Fenghua Development Sdn Bhd And Jurimba Sdn Bhd in relation to the same; and

(vi) Aggravated and special damages.

[8] The applicants contended that the remedy sought for by the applicants in the intended suit cannot be given in the winding-up proceedings without first obtaining judgment in the intended suit and hence the seeking of leave of the court for this intended suit to be brought.

Principle

Whether The Test At Leave Stage In A Section 226(3) Companies Act 1965 Application Is That Of A Prima Facie Test

[9] Learned counsel for the applicants, Mr Pavendeep Singh, submitted that the test to follow in deciding whether or not leave of the court should be granted under s. 226(3) of the Companies Act 1965 for a party to commence an action against a liquidator is that laid down in *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 at p. 447:

> In *re Cuthbert Lead Smelting Co Ltd* (1886)) WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, *the Court will always give an applicant leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.* We think the learned judge had applied the correct test laid down in *Cuthbert* case and we agree with him that leave should be given pursuant to section 226(3) of the Companies Act 1965 to the respondent to commence proceedings against Mosbert Berhad (In Liquidation) in respect of her claim to Private Lot No. 460 in Johore Grant No. 72 for Lot No. 83 in the Mukim of Plentong in the District of Johore Baru. (emphasis added)

[10] It was further submitted that the principle in *Mosbert Bhd* (*supra*) has never been departed from or overruled by the courts in Malaysia. The liquidator in his affidavit in reply had denied the test propounded in *Mosbert Bhd (supra)* to be the determining factor on whether leave should be granted. Instead, the liquidator contended that:

> 22. I have been advised by my solicitors that leave will only be granted for proceedings that ought to be allowed, i.e. probable success and that it is not vexatious or merely oppressive.

[11] The applicants through their counsel argued that the above contention by the liquidator is wholly untenable as it does not sit well with the well-established principles set by the Supreme Court in *Mosbert Berhad (supra)*.

[12] Learned counsel for the applicants further submitted that, in any event, the granting of leave by this Honourable Court in no way determines the intended suit in favour of either party. It only allows the applicants to bring an action against the respondent and/or its liquidator properly before the High Court. The respondent's liquidator is entitled to make all the necessary applications to challenge the sustainability of the applicants' case in the intended suit. The issues pertaining to the applicants' failure to prove the probable success of their claim and that the same is not vexatious or merely oppressive is a matter which should be properly dealt with by the High Court in the intended suit.

[13] The applicants here have asserted that their lots have been taken into custody by the respondent's liquidator and are seeking to retrieve the same by virtue of the intended suit. *Chatib Kari v. Mosbert Bhd* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 has recognised that it is a strong reason to grant leave to commence proceedings against a company in liquidation where a person asserted that his property has been wrongly taken into the custody of a liquidator. His Lordship Mahadev Shankar J (as he then was) observed as follows:

> It is plain therefore that where a person is asserting that property which he owns has been taken into the custody of the liquidator leave will readily be granted to enable that property to be retrieved.

[14] Learned counsel for the liquidator, Miss Sabrina Richards referred to *Re Perdana Merchant Bankers Bhd* [1997] 1 LNS 408; [1997] 3 MLJ 435 at p. 456, where His Lordship Abdul Malik Ishak J (as he then was) observed as follows:

> The object of s 446(1) of the Indian Companies Act 1956, which is equivalent to our s 226(3)(a) of the Act, has been described by A Ramaiya in the book entitled *Guide to the Companies Act* at p. 2449 in these words:
>
> The object of winding up of a company by the court is to facilitate the protection and realization of its assets with a view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Consequently, once the court has taken the assets of a company under its control or has passed an order for it being wound up, *it will not be proper to allow proceedings to be started or continued against the company and embarrass the administration of its affairs*. The present action is *intended to safeguard the assets of a company in winding up against wasteful or*

expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up court itself. (emphasis added)

[15] As for the test to be applied, it would be fair to say that the applicant should be required to show some *prima facie* evidence of succeeding at the trial so that the limited resources of a liquidator, who is an officer of the court, are not unnecessarily dissipated when it could be better focused on an expeditious and effective administration of the assets of the company in liquidation for the benefit of all stakeholders. The purpose of leave is to sieve out frivolous and unmeritorious claims of applicants and where as here, the applicants are alleging fraud on the part of the liquidator, the allegations at leave stage must be scrutinised more strictly.

[16] In *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 3 MLJ 571 at pp. 531-532 (CLJ); pp. 580-581 (MLJ), His Lordship Ramly Ali J (now FCJ) had occasion to consider the test to be applied where an applicant applied for leave to set aside a sale transaction entered into by a liquidator in favour of a third party. His Lordship expounded the law as follows:

[28] In ascertaining whether leave ought to be granted, the court has to satisfy itself that there is no wrongful interference in the liquidation process. The court will not allow the liquidator be subjected to unnecessary litigation or for a winding up process to be wrongfully impeded. One way in which the court achieves this is by requiring the grant of leave before an action can be brought against a liquidator. This was made clear in the Australian case of *Sydlow v. TG Kotselas* [1996] 14 ACLC 846 at p 852 where it was held:

> … the court must protect the integrity of the winding up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongly impede that process. One way in which this can be carried out is to require the grant of leave by the court in respect of any action against an official liquidator, so that the court can satisfy itself that there is no wrongful interference with the process.

[29] The control by the court over the circumstances in which and the extent to which its own officers are to be subjected to personal liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the court of its own process, (see: *Re Siromath* [1991] 1 ACLC 587).

A [30] Therefore, *before leave could be granted, the court must be satisfied that there is sufficient prima facie evidence to support any allegation made against the liquidator.* The court finds support in the decision of the High Court in *TN Metal Industries Sdn Bhd v. Ng Pyek Yew* [1996] 4 MLJ 567 where it was held:

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> His task is an onerous one. He is charged with a number of statutory duties … He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might level against him. He ought to be protected against such abuse unless here is sufficient *prima facie* evidence to support such allegation. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegation he be given leave to bring an action against a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstance come to a halt. No one will venture towards this task. A Liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed. (emphasis added)

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[17] Her Ladyship Nallini Pathmanathan JC (as she then was) when confronted with the question of the correct test to be applied before leave should be granted to commence an action against a liquidator, answered as follows in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [2009] 1 LNS 1030; [2010] 1 MLJ 547 at pp. 560-56, which case went up all the way to the Federal Court:

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> [6] What are the principles upon which leave is granted to commence legal action against a liquidator in the present context? The legal position was considered in *Mamone & Anor v. Pantzer* (2001) 36 ACSR 743 where Santow J held as follows:
>
> > … The applicable principles and their public purpose which underlie the requirement that a prospective litigant must obtain leave to sue a court appointed liquidator can be stated in the following propositions:
> >
> > (i) The court will protect its officer from spurious or vexatious litigation: *Re Siromath Pty Ltd* (No 3) (1991) 25 NSWLR 25 at p 29; *Re Magic Australia Pty Ltd (in liq)* (1992) 7 ACSR 742 at p. 746; 10 ACLC 929 at p. 932; and

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(ii) The court will protect the integrity of the winding up process to ensure no wrongful interference with that process: *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd* (1996) 65 FCR 234 at p 241; 144 ALR 159 at p 165-6.

To those ends, a prospective litigant must, to obtain the necessary leave, demonstrate its claim has sufficient merit. What is sufficient is affected by the circumstances and timing in which that leave is sought. Moreover courts recognise that liquidators, like administrators, often have to make decisions on the run; to expect perfection in those circumstances is unrealistic. In *Sydlow* above, Tamberlin J stated at FCR 242; ALR 165:

> The discretionary power of the court to grant leave must be exercised having regard to all the circumstances of the particular cases and bearing in mind the need to protect the integrity of its process. It does not necessarily follow that, in order to obtain leave, a *prima facie* case must be demonstrated. There is no specific threshold appropriate in all cases, however there must be more than mere assertion. The court's discretion may be exercised on many grounds, including, but not limited to, the sufficiency of the evidence adduced, as to the prospects of success of the action on the application for leave. (emphasis added.)

[7] To summarise, the court is bound to keep in mind its duty to protect the liquidator from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process in deciding on whether or not to grant leave. On the facts of any particular case, *sufficient merits have to be shown and while it does not necessarily follow that a prima facie case must be demonstrated*, no specific threshold is set for all cases, as each **case must be evaluated and analysed on its own facts**. Notwithstanding this **mere assertion is insufficient**. The court is at liberty to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the prospective suit. It is evident therefore that there must be a minimum or threshold level of evidence substantiating the claim of a breach of duty to warrant the grant of leave.

[18] In the Singaporean case of *Excalibur Group Pte Ltd v. Goh Boon Kon* [2012] 2 SLR 999, Quentin Loh J, adroitly analysed the different tests propounded in the cases emanating from Australia and from our courts and concluded quite fairly as follows:

[34] There is no clear test for the grant of leave in the Australian authorities. Some of the cases take the view that there is no specific threshold for the grant of leave to sue a liquidator (see

Sydlow ([18] *supra*) at 166; followed in Mamone ([18] *supra*) at [5]). According to these authorities, a *prima facie* case need not necessarily be shown. All the circumstances have to be taken into account in determining whether leave should be granted (see *Sydlow* at 166). An example of a factor that would influence the grant of leave is **whether there was an unjustifiable delay in commencing proceedings against the liquidator** (see Mamone at [6]). Another case held that **the standard was simply one of whether there is a *prima facie* case** (see *Re Biposo Pty Ltd; Condon v. Rodgers* (2 August 1995) (Supreme Court of New South Wales; Young J) cited in *Armitage* ([18] *supra*) at [37]). Yet another case appeared to apply a combined test of *whether there was a prima facie case and whether there was sufficient evidence to show that the proposed claims had a prospect of success* (see *Armitage* at [65]). The Malaysian authorities do not also speak with one voice on the threshold for leave. One case applied a test of whether there was "**sufficient *prima facie* evidence**" to support the allegations against the liquidator (see *Abric* ([25] *supra*) at [30]). Another case took the view, similar to some of the Australian authorities, that the threshold for leave would depend on the circumstances and that a variety of factors such as the **"sufficiency of the evidence adduced" and the "likelihood of success" of the proposed action should be considered** (see *See Teow Guan* ([25] *supra*) at [7]). Another authority considered that the court hearing the application for leave will "act liberally" (*Chi Liung Holdings* ([25] *supra*) at 210G - H). However, the applicant is required to satisfy the court of the *"probable success" of the action and that the action is "not vexatious or merely oppressive"* (*Chi Liung Holdings* at 210G - H). The Canadian approach seems to set the threshold at a lower level. Leave will not be denied "unless there is no foundation for the claim or the claim is frivolous or vexatious" (see *Houlden* at para K§8).

[35] The foregoing cases show a considerable range in the different standards of proof to be met before leave is granted. In my view, *all the facts and circumstances of the case have to be taken into consideration when deciding whether to grant leave.* Hard and fast rules should not be laid down. To my mind, **the applicant must at least be able to show a prima facie arguable case.** An applicant need not go so far as to show he will or is likely to succeed. Applications without any foundation or that are frivolous or vexatious or calculated to delay proceedings or with an ulterior motive will not be allowed. The stage at which the proceedings are when such applications are made will also be a very relevant consideration. **Delays in taking out such applications, unless there are good reasons, will also weigh against an applicant**. (emphasis added)

[19] The Federal Court in *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; [2012] 2 MLJ 713 at p. 520 (CLJ); p. 729 (MLJ) appears to have preferred the *prima facie* test as His Lordship Zulkefli CJ (Malaya) expressed it thus:

> [15] In order to succeed for the granting of leave the majority contributories *must also make out a prima facie case, a standard to protect the court's officer and the winding up process* (see the cases of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd* [2007] 3 MLJ 571; [2007] 7 CLJ 516; *TN Metal Industries Sdn Bhd v. Ng Pyak Yeow* [1996] 4 MLJ 567; [1995] 1 LNS 320 and *Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584. These cases show that *in applying the test the court is compelled to evaluate the evidence led to determine whether the test is met*. In *Mamone and another v. Pantzer* (2001) 36 ACSR 743, it was held that prospective litigant must, to obtain leave, demonstrate its claim has sufficient merit. (emphasis added)

Whether The Applicants Have Satisfied The Prima Facie Test Against The Liquidator At Leave Stage In A s. 226(3) Companies Act 1965 Application

[20] As stated by the liquidator in his affidavit, he had no records of the alleged beneficial interest of the proposed interveners. In the light of the above, a proof of ownership exercise was commenced on all units in the said Kompleks Aik Aik and all the alleged purchasers were required to produce the certified true copy by a solicitor of the principal sale and purchase agreement together with the proof of payment to the respondent prior to the date of liquidation either by cash or loan transaction and also all sub-sale transactions (if any). The steps taken were as follows:

(a) Advertisements in three local newspapers on three different dates, ie, 11 July 2008, 5 November 2008 and 29 May 2009. In the said advertisements, the documents required were listed out and in the final advertisement, the unit nos. was specified.

(b) Letters dated 11 July 2008 (to submit proof of legal and/or beneficial ownership and also meeting at R Garuda Seafood), 6 November 2008 and solicitors' letter dated 29 May 2009.

(c) Meetings scheduled at Anson Hotel Perak on 4 April 2008 and R Garuda Seafood on 25 July 2008 wherein the verification exercised was explained to all present during the meeting including the deponent of the said affidavit in support.

[21] The above documents were all exhibited as exh. "JR1", pp. 1-25 in the said affidavit in reply of the liquidator in encl. 47.

[22] After receipt of the liquidator's solicitors' letter dated 29 May 2009, the following transpired. The liquidator must be allowed to say it in his own succinct summary of the material chronology of crucial facts as follows as set out in pp. 5-7 of his affidavit in reply in encl. 47:

> Unit No A2/8B claimed by applicant Wong Hoe Lim and Ngoo Heing Hwa
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> After receiving the said liquidator solicitors' letter dated 29 May 2009, the proposed intervener, namely, Wong Hoe Lim, forwarded the statutory declaration dated 3 June 2009 enclosing his identity card and bank statement without specifying unit no. By letter dated 9 July 2009, the said solicitor requested for documents not previously forwarded via the statutory declaration within 14 days from the date of the said letter, failing which, an application to vest Unit No. A2/8B in the said Kompleks Aik Aik will be filed in court. However the proposed intervener failed, refused and/or neglected to forward the documents requested despite the fact that the 14 days' notice period had expired on 23 July 2009.
>
> A copy of the relevant documentation appear as exh. "JR2", pp. 26-28 in the said affidavit in reply of the liquidator in encl. 47.
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> Unit No. A1/15 claimed by applicant Wong Ngan Sim
>
> On or about 15 July 2009, a fax transmission was received from the proposed intervener, namely, Wong Ngan Sim, stating an interest to redeem Unit No. A1/15. By letter dated 20 July 2009, the proposed intervener was informed that the balance purchase price due and owing is RM189,000. The proposed intervener was given fourteen days to remit the balance purchase price but the said proposed intervener failed, refused and/or neglected to do so despite the 14 days notice despite the 14 days notice period had expired on 4 August 2009.
>
> A copy of the relevant documentation is exhibited as exh. JR 3.
>
> Unit No. A2/10A claimed by applicant Wong Kong

After receiving the solicitors' letter dated 29 May 2009, the proposed intervener, namely, Wong Kong, forwarded documents but not the complete set, ie, principal sale and purchase agreement and the deed of receipt and reassignment to prove that the loan had been fully disbursed to the respondent. By letter dated 9 July 2009 the liquidator's solicitors requested for documents not previously forwarded within fourteen days from the date of the said letter, failing which, an application to vest Unit No. A2/10A in the said Kompleks Aik Aik will be filed in court. However the proposed intervener failed, refused and/or neglected to forward the documents requested despite the fact that the 14 days notice period had expired on 23 July 2009.

A copy of the relevant documentation are enclosed and marked as exh. JR 4 in encl. 47.

Unit No. A2/2B claimed by Lim Tiang Choy

On 30 September 2009, the proposed intervener only submitted a copy of the identity card and deed of receipt and reassignment. After the vesting order for Unit No. A2/2B was obtained on 4 May 2010, the proposed intervener sent a letter dated 7 January 2011 emphasising himself as the owner of Unit No. A2/2B. The proposed intervener proceeded to send the principal sale and purchase agreement between the respondent and the first purchaser, the deed of assignment between the first purchaser and the second purchaser, loan agreement cum deed of assignment between the second purchaser and Affin Bank Berhad with official receipts and also official receipts from the second purchaser confirming that the balance purchase price had been paid. The documents sent is not conclusive that the purchase price to the respondent has been fully settled.

A copy of the relevant documentation is enclosed and marked as exh. JR 5.

[23] As the proposed interveners had failed, refused and/or neglected to submit the complete set of documents to prove their ownership of the units claim, the liquidator proceeded under

s. 233 of the Companies Act 1965 to obtain a vesting order of the said units from the court. The section reads:

> 233. Custody and vesting of company's property
>
> (1) Where a winding up order has been made or a provisional liquidator has been appointed, the *liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.*
>
> (2) *The Court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator* and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.
>
> (3) Where an order is made under this section every liquidator of a company in relation to which the order is made shall lodge within seven days of the making of the order:
>
> (a) an office copy of the order with the Registrar; and
>
> (b) where the order relates to land, an office copy of the order with the appropriate authority concerned with the registration or recording of dealings in that land,
>
> and every liquidator who makes default in complying with this section shall be guilty of an offence against this Act.
>
> Penalty: Two thousand ringgit. Default penalty.
>
> (4) No vesting order referred to in this section shall have any effect or operation in transferring or otherwise vesting land until an appropriate entry or memorandum thereof is made by or with the appropriate authority." (emphasis added)

[24] A copy of the vesting order is found in exh. "A4" in the affidavit in support of the proposed intervener in encl. 42. The application *via* a notice of motion was filed by the liquidator on 30 December 2009 and the vesting order was obtained on 4 May 2010. Subsequently a tender was placed in the New Straits Times

and Sin Chew Daily on 1 September 2010. Prospective bidders were invited to offer to purchase eight units in the said Kompleks Aik Aik inclusive of the said units. The closing date to place the offer was 14 September 2013. An offer was made by the said purchaser, Jurimba Sdn Bhd, to purchase the said units inclusive of the four units claimed by the proposed interveners. A copy of the tender placed in the newspapers is found in exh. "JR7" in encl. 47.

[25] The proposed interveners referred to a court order obtained in Originating Summons No. 24-710-1998 by Asia Commercial Finance Berhad against the registered owner of the master title Fenghua Development Sdn Bhd for an order for sale upon default of a bridging loan granted to the respondent secured against the said master title. Apparently the respondent had intervened in the proceeding and filed various affidavits in which a list of purchasers for the various shop lots in Kompleks Aik Aik were put before the court including the said units in question. The proposed interveners contended that a consent order was recorded wherein the various shop lots including the said units were excluded from the auction. However a copy of the said court order was not exhibited and produced though said to be so exhibited and produced and marked as exh. "A6".

[26] I do not think the liquidator could be faulted for taking the various steps outlined above to ascertain the assets of the company and to write to the various parties who could have an interest in the assets and to ask them to furnish the relevant documents for verification. More than ample time had been given to the proposed interveners here with respect to the intention of the liquidator to apply to the court for a vesting order. The last paragraph of the solicitors' letters on behalf of the liquidator to the proposed interveners dated 29 May 2009 appearing at pp. 18-25 of exh. "JR1" in encl. 47 read as follows:

> In light of the above and our client's numerous attempts to contact owners *via* the first owners meetings, newspaper advertisements in the New Straits Times and Sin Chew on the 11 July 2008 and the New Straits Times and Berita Harian on the 5 November 2008 and the letters/notices sent out, kindly revert to us within Fourteen (14) Days from the date of this letter ie on or before 11.6.2009, *failing which we shall proceed to obtain the appropriate Court Order to finalise the liquidation process wherein your rights to the said property (if any) will be terminated without any further notice to you.* (emphasis added)

[27] There was also no record of any service charges having been paid to the local authority and as such the municipal council set off the service charges for all the units and imposed RM800 to be paid to form the joint management body. See exh. "JR6" in encl. 47.

[28] There are merits in the liquidator's contention that leave should not be granted to the proposed interveners to set aside the said vesting order as the liquidator and his representatives were carrying out their duties within the ambit of the law by taking all precautionary steps and measures to identify sold and unsold units in the Kompleks Aik Aik. The vesting order was obtained after a full and frank disclosure as to what had taken place in the verification exercise taken.

[29] In another High Court case on facts not too dissimilar, in Kuala Lumpur High Court Commercial Division in Originating Summons No. 24NCC-85-03/2012, *Resolution Alliance Sdn Bhd v. Jerah Bina Sdn Bhd (In Liquidation) & 3 Ors*, it was held by as follows:

> (51) Berdasarkan kronologi peristiwa kes ini, saya berpendapat adalah tidak adil berdasarkan prinsip ekuiti bagi membenarkan kepentingan benefisial plaintif yang tidak dituntut sebelum perintah perletakan hak. Adalah tidak adil untuk menuntut gantirugi terhadap defendan pertama dan ketiga kerana kelalaian plaintif sendiri dalam menuntut haknya.
>
> (53) Saya berpendapat perintah perletakan hak bertarikh 15.11.2007 berkuatkuasa kerana:
>
> (i) kegagalan plaintif untuk memberi respon kepada iklan-iklan yang secara munasabahnya telah dilaksanakan oleh Pelikuidasi. Atas sikap dan kelalaian plaintif sendiri telah tidak melindungi kepentingannya sekiranya ada.

[30] On appeal to the Court of Appeal, the decision of Her Ladyship Has Zanah Mehat J above was affirmed on 18 October 2013.

[31] I cannot say that the liquidator had acted unreasonably in acting the way he did. In fact he was careful to take all reasonable steps to ascertain the assets of the company before auctioning off the said units by way of a public tender. I agree with the liquidator's submission that the proposed interveners had failed to protect its alleged beneficial interest by responding to the verification exercise conducted by the liquidator *via* advertisements and letters as referred to above.

[32] As was held in *Hee Kon Ying v. Janlee Development (M) Sdn Bhd & Another Appeal* [2012] 1 LNS 790; [2013] 9 MLJ 701 at p. 710 as follows:

> [25] The main point to consider here is whether the liquidators had acted reasonably in selling the said properties. It is evident before me that the liquidators under these circumstances had exercised reasonable steps in searching for the best price of the said properties and in selling them. In fact, it is for the applicant to satisfy this court through credible and concrete evidence that the liquidators had acted unreasonably or that the liquidators were acting in a manner that no reasonable liquidator would act. The court will not interfere if the applicant who alleged as such fails to do so (see *Leon v. York-O-Matic Ltd* [1966] 3 All ER 277 and *Abric Project Management Sdn Bhd v. Palmshine Plaza & Anor*.
>
> [26] In short, I find that there was no *prima facie* evidence to support the allegations made against the liquidators. As such, the court refuses to interfere with the decision of the liquidators.

[33] I also take into consideration the fact that the said units had been sold to a purchaser who had purchased them through a tender exercise. There is no indication that the third party purchaser is anything less than a *bona fide* purchaser. In *Wong Yuen Hock v. Ban Hin Lee Bank Bhd & Anor* [2002] 4 CLJ 99 at p. 100 it was held:

> [2] The intervener was a *bona fide* purchaser without notice. He had paid the purchase price in full and the land had also been registered in his name. He was, therefore, entitled to take possession of the land. (p 103 f)

[34] It is too late now to unscramble the whole exercise. The observation in *The "Honey I" Ex "Cassio" Singapore Slipway & Engineering Co (Pte) Ltd v The "Honey I" Ex "Cassio" (Owners) Robina Credit Ltd & Ors (Interveners)* [1987] 1 LNS 42 is worthy of reproduction here:

> He adopted the latter course and had acted under an order of court binding on all parties before it. I also agree with Singmarine that it is too late in the day to unscramble the entire arrangements without prejudicing the rights of Singmarine. If I accede to the Mortgagees' application, the effect would be that the insurance proceeds would not be part of the fund for distribution by the High Court exercising its admiralty jurisdiction and conceivably the Mortgagees would then be in a position to rely on the terms of their mortgage instrument and claim the insurance money's for themselves.

[35] It is to be noted that this application was made on 9 September 2012, way after the vesting order had been obtained on 4 May 2010 and even after the subsequent sale to a third party on 13 December 2010. In *Re London Iron and Steel Co Ltd* [1990] BCLC 372 at pp. 375-376, it was observed:

> Whether the court had jurisdiction to order that the property be handed over where there was a dispute as to its ownership - Insolvency Act 1986, s. 234(2) - Insolvency Rules 1986 (SI 1986/1925), r 4.185.
>
> The phrase 'to which the company appears to be entitled', again as counsel for the receivers pointed out, raises the question: appears to whom? The only answer to that question can be: to the court on the basis of the evidence before it. To the question why the section uses the phrase 'to which the company appears to be entitled' rather than the phrase 'to which the company is entitled', the answer was suggested by counsel for the respondents himself when he said that the reason for that choice of words may be to absolve the office-holder from the need to prove the company's title strictly. In other words, it leaves open the possibility that there may be a third party with a good claim to the property.

[36] The court would be most reluctant to interfere with the exercise of the duties of the liquidator confronted with many units having incomplete documentations because of the long lapse of some 12 years from the date the company was wound up on 26 September 1996 to the appointment of the current liquidator on 4 February 2008. The extent of the verification exercise conducted, the deadlines for complete documentations to be submitted, the application to court for a vesting order of the units in question and the subsequent sale by tender are all matters within the broad discretion of the liquidator. The approach taken by the court when a challenge is made against a liquidator's action is exemplified in *Chin Ah Keow v. Anggun Pintas Sdn Bhd & Ors* [2005] 1 LNS 92; [2005] 4 MLJ 747 at pp. 757 as follows:

> 16. The function of the court under s. 279 is to hear the matter as a strict appeal from the decision of the liquidator. The powers given to the court are to consider whether the act or decision of the liquidator was right, so that it should be confirmed, or was wrong, so that it should be reversed, or partly right and partly wrong, so that it should be modified. To do this *the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising.*

It was further stressed in that case (Re Equity Funds of Australia) that the court will not interfere simply because its opinion might differ from that of the Liquidator.

17. A liquidator is an officer of the court, and the modern liquidator today performs many of the functions which in former ages were dealt with by a judge, registrar, at least in the first instance. In addition, the persons eligible to be registered and appointed liquidators only are so eligible because they possess not only the appropriate qualifications in accounting, but also are experienced in the world of commerce. The companies legislations and orders of the court these days usually commit the entire conduct of liquidation to the liquidator and empower him to do what is in his commercial judgment he thinks best in the interest of the creditors as a whole. (emphasis added)

[37] Though spoken in the context of s. 279 of the Companies Act 1965, the same approach may be applied to a leave application under s. 226(3) of the Act. Taken as a whole, the applicants have not established a *prima facie* case against the liquidator to justify the leave.

Whether The Applicants Are Guilty Of Laches Such That Leave Under s. 226(3) Companies Act 1965 Should Not Be Given

[38] The interveners/applicants had been informed by the liquidator's solicitors Messrs Hakem Arabi & Associates through their letter of 9 July 2009 (pp. 27-28 encl. 47, exh. JR2 with respect to Wong Hoe Lim); and letter of 9 July 2009 (pp. 34-35 encl. 47, exh. JR4 with respect to Wong Kong) that the documents they furnished to the liquidator were not complete and further documents were requested. They were to revert within 14 days failing which the liquidator would proceed with an application to court for a vesting order. They did not respond or ask for an extension of time or put the liquidator's solicitors on notice that they had wanted to be heard on the hearing of a vesting order.

[39] In the case of Wong Ngan Sim and 2 others, by the letter of 20 July 2009 from the liquidator's solicitors (pp. 30-31 exh. JR3), it was clear that they had only paid 10% of the purchase price of RM210,000. They were required to pay within 14 days. It was clear from their own letter to the liquidator dated 20 December 2010 at p. 32 exh. JR 3 encl. 47, they still had not paid the balance purchase price. The liquidator informed them by their letter of 7 January 2011 that he had disposed of the said

unit pursuant to the vesting order of 4 May 2010. They were rightly told to submit their proof of debt form for monies paid to the company before it was wound up.

[40] As for Lim Tiang Choy, he only submitted his documents after 5 January 2011 as can be seen in his letter at p. 36 exh. JR5 encl. 47.

[41] Even if their slow response could be overlooked because of the long passage of time from the dates their sale and purchase agreements were signed, no efforts were made to stop the sale by tender which were advertised in the New Straits Times and Sin Chew Daily, both on 1 September 2010. Assuming again that they could be excused, there was certainly no excuse when they received the notice to quit dated 5 October 2011 from Jurimba Sdn Bhd's solicitors Messrs Maxwell, Kenion, Cowdy & Jones. See one such letter to Wong, Hoe Lim in exh. A5 of encl. 42. The said application was not filed until 9 September 2013; some two years later.

[42] The doctrine of laches has been applied by our courts in a number of cases. In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779 at pp. 802 - 803, His Lordship Gopal Sri Ram JCA (as he then was) referred to the case of *Erlanger v. New Sombrero Phosphate Co* [1878] 3 App Cas 1218 where it was held as follows:

> The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

After quoting that passage Lord Blackburn continued (at pp. 1279-1280):

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

To this counsel for the plaintiffs retorts that that applies only where you are considering the doctrine of laches or acquiescence in relation to the assertion of equitable rights and not where you are considering the enforcement by equitable means of legal rights; and we were regaled with authorities on both sides for the purpose of establishing whether a plaintiff in a passing-off action is protecting a legal right or an equitable right.

I have to confess that I detect in myself, despite the erudition displayed by both counsel, a strong predilection for the view that such distinctions are both archaic and arcane and that in the year 1980 they have but little significance for anyone but a legal historian. For myself, I believe that the law as it has developed over the past twenty years has now evolved a far broader approach to the problem than that suggested by counsel for the plaintiff and one which is in no way dependent on the historical accident of whether any particular right was first recognised by the common law or was invented by the court of Chancery. It is an approach exemplified in such cases as *Inwards v. Baker* [1965] 1 All ER 446, [1965] 2 QB 29 and *Crabb v. Arun District Council* [1975] 3 All ER 865, [1976] Ch 179.

We have been referred at length to a recent judgment of my own in *Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897, [1981] 2 WLR 576 in which I ventured to collect and review the authorities ...

[43] In *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] 1 LNS 244, His Lordship Hashim Yeop Sani J (as he then was) held as follows:

> Apart from mere denial that there was any trust involved in respect of the property in question express or implied it is also a basis of the defence that the plaintiff company's claim is barred

by limitation and or by laches or acquiescence. Since the claim is based on an alleged implied trust and for the recovery of the trust property and that the plaintiff company is a beneficiary under the trust s. 22(1) of the Limitation Ordinance, 1953 excludes the period of limitation of action prescribed by that Ordinance. No statutory period of limitation would apply to an action by a beneficiary if it can be shown that the action is under a trust and for the recovery from the trustee of trust property previously received but converted to his use. That leaves us only with the question of laches and acquiescence. Section 32 of the Limitation Ordinance 1953 provides that nothing in that Ordinance shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, ie, where the plaintiff has slept upon his right and acquiesced for a great length of time. For "laches" literally means negligent inactivity. He is then said to be barred by his laches. (*Halsbury's* 3rd Edn. vol. 14, p. 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part. Of course acquiescence depends on "knowledge, capacity and freedom." It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary for meeting the claim, for a court of equity will not allow a dormant claim to be set up when the means of resisting it have perished.

[44] Likewise in *Kewangan Bersatu Bhd v. Yap Ah Yit & Ors* [1999] 1 CLJ 429 at p. 434 it was observed as follows:

This delay has indirectly led to the plaintiff waiving their rights to claim against the defendants. In *Malaysia National Insurance Sdn Bhd v. Tan Kong Min* [1997] 3 BLJ 121, it was held that:

> The conduct of plaintiff in delaying the enforcement of its right clearly calls for the application of the equitable doctrine of laches. The maxim *vigilantibus et non dormientibus lex succurrit* ought to apply.
>
> It is unjust to give the plaintiff a remedy where it has by its conduct done that which might fairly be regarded as equivalent to a waiver of it.

Pronouncement

[45] The unexplained delay on the part of the applicants coupled with the fact that the said units have been transferred to the new purchaser after a vesting order has been obtained and the fact that the liquidator has conducted the whole verification exercise of the assets of the company carefully and with all due circumspection, would constrain me to exercise my discretion to disallow leave and to dismiss the application.

[46] It is too late in the day to set aside the sale to a third party properly conducted by the liquidator. I exercised my discretion and made no order as to costs.

[47] As the applicants had contended that Jurimba Sdn Bhd, the purchaser had perpetrated fraud on them, they are at liberty to pursue against Jurimba Sdn Bhd as it is not the subject of a winding-up order.